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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/035,650	12/28/2001	Lisa Bushman	KCC 4801 (K. C. No. 16,90	4610

321 7590 06/14/2005

SENNIGER POWERS LEAVITT AND ROEDEL
ONE METROPOLITAN SQUARE
16TH FLOOR
ST LOUIS, MO 63102

EXAMINER

STEPHENS, JACQUELINE F

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 06/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/035,650

Applicant(s)

BUSHMAN ET AL.

Examiner

Jacqueline F. Stephens

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 April 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-39 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-39 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 3/18/05 have been fully considered but they are not persuasive.

Applicant argues Kashiwagi does not disclose that the liquid permeable sheet 2a is stretchable upon application of a load and further argues the sheet is rendered non-stretchable as it is adhered to the absorbent core 2b. While the sheet is adhered to the absorbent core 2b, elastic threads 6 are adhered to the absorbent core 2b, which renders the sheet, which includes 2a and 2b (Figure 3) capable of stretching upon application of a load. Moreover, Kashiwagi teaches the member 2 can move freely over the support body in accordance with the motions of the wearer's body while fitting on the private part (col. 5, lines 50-55) and that the sheet 2a may exhibit elastic shrinking forces (and inherently opposing extending forces) and may be prepared by adhering an elastic member in a stretched state (col. 9, lines 34-46).

In response to applicant's argument that Enloe fails to disclose a liquid permeable liner adapted to stretch upon application of a load, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Applicant has relied on

Enloe for a teaching of an elastomeric outer cover. Regarding the limitation of the outer cover stretch being greater and the discussion of the stretchability of the elastic strands of Kashiwagi, this limitation is directed to an intended use of the article. The structure of Kashiwagi/Enloe provides a gap between the bodyside liner and the absorbent body (Figure 3 of Kashiwagi), which is the structure being claimed. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1, 3-10, 22-27, and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kashiwagi USPN 647182 in view of Enloe et al. USPN 4846825.

As to claims 1, 3, and 23, Kashiwagi USPN 6471682 discloses an absorbent article comprising: an outer cover 3c; a liquid and gas permeable bodyside liner 2a defining a bodyfacing surface and being generally superposed and coextensive with the outer cover (Figures 1-3), the bodyside liner being adapted to stretch upon application of the load by a second amount; an absorbent body located between the bodyside liner and the outer cover and generally movable with the outer cover upon stretching of the outer cover; and said first amount of stretch of the outer cover being greater than said second amount of stretch of the bodyside liner whereby a gap is formed between the bodyside liner and the absorbent body facilitating the flow of air and vapor through the

Art Unit: 3761

bodyside liner in a loaded condition of the absorbent body (Figures 3, 5, and 6). The extensibility of the bodyside liner is provided by a plurality of cords (Figures 1 and 2).

Kashiwagi does not specifically disclose the outer cover is adapted to stretch upon application of a load by a first amount. Enloe discloses an outer cover to prevent leakage of wastes from the absorbent and aids in positioning the absorbent to the body (col. 8, lines 53-63). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the outer cover of Kashiwagi with an elastomeric outer cover for the benefits taught in Enloe. Kashiwagi/Enloe discloses the elastic members 4-6 are attached to the bodyside liner, which causes the bodyside liner to retract; therefore, the bodyside liner is relatively more resilient when stretched than the outer cover.

As to claim 4, the suspension is capable of retracting the bodyside liner subsequent to stretching of the bodyside liner. These limitations are directed to an intended use of the article. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations.

As to claim 5, Kashiwagi/Enloe discloses the suspension comprises at least one elastic (Kashiwagi Figure 1, elements 4-6) cord located between the bodyside liner and the absorbent body, the elastic cord being stretched axially upon stretching of the bodyside liner (Kashiwagi Figures 1-3).

As to claim 6, see Figure 3, Kashiwagi.

As to claims 7 and 24, Kashiwagi/Enloe discloses the garment including an anterior region, a posterior region and a crotch region disposed longitudinally there between, the anterior region, posterior region and crotch region being integrally formed and configured when worn to define a central waist opening and a pair of leg openings (Kashiwagi Figure 1), the crotch region extending generally laterally between said leg openings and wherein the cord extends lengthwise generally parallel to line extending from the anterior region to the posterior region (Kashiwagi Figures 1-3).

As to claims 8 and 25, Kashiwagi/Enloe discloses the cord is attached to the bodyside liner by adhesive (Kashiwagi col. 9, lines 14-16).

As to claims 9 and 26, see Kashiwagi Figures 8 and 9.

As to claims 10 and 27, see Kashiwagi col. 4, lines 46-51.

As to claims 22 and 39, Kashiwagi see Figure 6.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. Claims 11-21 and 28-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kashiwagi USPN 6471682 over Enloe USPN 4846825 and further in view of Enloe USPN 4895568. Kashiwagi does not specifically disclose stretch and extension. However, Enloe '568 teaches the elastic members should exhibit sufficient elongation and contracting force for the benefit of not exhibiting undesired bunching (Enloe '568 col. 10, lines 6-21) and Kashiwagi teaches sufficient stretch and tension to provide conformance to the body. One of ordinary skill in the art would be able to

determine through routine experimentation the ideal level of stretch and extension for a desired load for a specific use.

Conclusion

8. THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F. Stephens whose telephone number is (571) 272-4937. The examiner can normally be reached on Monday-Friday 9:00-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (571) 272-4390. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.


Art Unit: 3761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Jacqueline F Stephens
Examiner
Art Unit 3761

June 10, 2005



Larry I. Schwartz
Supervisory Patent Examiner
Group 3700